

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

PINCHECK, L.C.,

Plaintiff,

vs.

TEMPO PAYMENTS, INC.,

Defendant.

No. C07-0011

**RULING ON MOTION TO STRIKE
AFFIRMATIVE DEFENSES**

TABLE OF CONTENTS

<i>I. INTRODUCTION</i>	2
<i>II. ISSUE PRESENTED</i>	2
<i>III. APPLICABLE LAW</i>	2
<i>IV. ANALYSIS</i>	3
<i>A. Second Affirmative Defense -- Vagueness</i>	3
<i>B. Sixth Affirmative Defense -- Applicable law</i>	5
<i>C. Tenth Affirmative Defense -- Statute of Limitations</i>	5
<i>D. Eleventh Affirmative Defense -- Laches</i>	6
<i>E. Twelfth Affirmative Defense -- Unclean Hands</i>	7
<i>F. Fifteenth Affirmative Defense -- Lack of Harm</i>	7
<i>G. Twentieth Affirmative Defense -- Exemplary Damages</i>	8
<i>V. ORDER</i>	9

I. INTRODUCTION

This matter comes before the Court on the Motion to Strike Affirmative Defenses (docket number 21) filed by the Plaintiff on August 7, 2007, and the Resistance (docket number 26) filed by the Defendant on August 27, 2007. Pursuant to Local Rule 7.1.c, the Motion will be decided without oral argument.

II. ISSUE PRESENTED

On June 12, 2007, Plaintiff PINcheck L.C. (“PINcheck”) filed its First Amended Complaint and Jury Demand (docket number 8). On July 16, 2007, Defendant Tempo Payments, Inc. (“Tempo”) filed its Answer (docket number 14). Included in Tempo’s Answer were twenty affirmative defenses. In its instant Motion, PINcheck requests that the Court strike seven of the enumerated affirmative defenses.

III. APPLICABLE LAW

Federal Rule of Civil Procedure 12(f) provides, in part, that “the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” PINcheck argues that the challenged affirmative defenses “are improperly pleaded, interject irrelevant or immaterial issues, assert defenses that are insufficient as a matter of law, and/or would prejudice PINcheck by unduly broadening the issues in this case.”¹ Tempo argues, on the other hand, that its affirmative defenses were “appropriately asserted.”

The Eighth Circuit Court of Appeals observed in *Stanbury Law Firm v. Internal Revenue Service*, 221 F.3d 1059 (8th Cir. 2000), that it “has rarely been called upon to interpret Rule 12(f).” *Id.* at 1063. While recognizing that the district court enjoys “liberal discretion” under the rule in striking improper pleadings, the Court noted that “striking a party’s pleadings is an extreme measure” and that “motions to strike under FED. R. CIV. P. 12(f) are viewed with disfavor and are infrequently granted.” *Id.* (citing

¹See Plaintiff’s Motion to Strike Affirmative Defenses (docket number 21-1) at 2, ¶ 4.

Lunsford v. United States, 570 F.2d 221, 229 (8th Cir. 1977)). See also *BJC Health System v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007) (“Judges enjoy liberal discretion to strike pleadings under Rule 12(f). . . . Striking a party’s pleading, however, is an extreme and disfavored measure.”) (citing *Stanbury*).

“A motion to strike a defense will be denied if the defense is sufficient as a matter of law or it fairly presents a question of law or fact which the Court ought to hear.” *Lunsford v. United States*, 570 F.2d 221, 229 (8th Cir. 1977) (quoting 2A Moore’s Federal Practice ¶ 12.21 at 2437 (2d ed. 1975)). The movant bears the burden of proof.

The party moving to strike under authority of FED. R. CIV. P. 12(f) bears a heavy burden. The Court may grant a motion to strike an affirmative defense only if no questions of law or fact exist and the defense sought to be stricken could not succeed under any set of circumstances.

Burns v. Office of Attorney General, 2007 WL 2247600 (D. Minn.) (citing *First State Bank System, Inc. v. Martin*, 282 F. Supp. 425, 426 (D. Minn. 1991)). With these general principles in mind, the Court now turns to the seven affirmative defenses objected to by PINcheck.

IV. ANALYSIS

A. Second Affirmative Defense -- Vagueness

In its Second Affirmative Defense, Tempo asserts that “PINcheck’s claims are uncertain, vague, and ambiguous.”² PINcheck argues that “[t]his defense lacks basis, and PINcheck disputes whether it even is a proper or recognized affirmative defense.”³

Federal Rule of Civil Procedure 8(a) provides that a pleading shall contain “a short and plain statement” of the grounds for the court’s jurisdiction, a “statement of the claim showing that the pleader is entitled to relief,” and a demand for the relief sought.

²See Answer (docket number 14) at 5.

³See Brief in Support of Plaintiff’s Motion to Strike Affirmative Defenses (docket number 21-2) at 3.

FED. R. CIV. P. 8(a). “This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002).

In support of its argument that vagueness may be pleaded as an affirmative defense, Tempo cites FED. R. CIV. P. 12(e) which provides, in part, as follows:

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party *may* move for a more definite statement before interposing a responsive pleading.

FED. R. CIV. P. 12(e) (emphasis added).

Tempo argues, without citing any authority, that it “was permitted -- if it chose -- to file a motion for a more definite statement or, if it preferred, to interpose an affirmative defense concerning the vagueness of PINcheck’s claims.”⁴ While the use of the term “may” certainly makes a motion for more definite statement pursuant to Rule 12(e) discretionary, it does not necessarily (or logically) follow that a party claiming vagueness may raise the issue in an affirmative defense.

The Court in *Swierkiewicz* noted that the simplified notice pleading standard in Rule 8(a) is “inextricably linked” to other provisions of the Federal Rules of Civil Procedure, including Rule 12(e). 534 U.S. at 513-514. “If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding.” *Id.* at 514. The purpose of the “simplified pleading system” contained in the Rules is “to focus litigation on the merits of a claim.” *Id.*

Tempo fails to explain how an affirmative defense of vagueness would play out. Does Tempo believe that they may be entitled to summary judgment because the Complaint is vague? Would the issue be submitted to a jury? The Court concludes that if a party

⁴See Tempo Payments, Inc.’s Resistance to Plaintiff’s Motion to Strike Affirmative Defenses (docket number 26) at 5.

believes that the other party's pleading is lacking in specificity, then it "may" make a motion for more definite statement pursuant to Rule 12(e). If the party elects not to seek additional specificity for any reason, however, then it is not entitled to any additional relief on that ground. Therefore, the Court concludes that Tempo's Second Affirmative Defense is "insufficient" and "immaterial" and should be stricken pursuant to Rule 12(f).

B. Sixth Affirmative Defense -- Applicable law

In its Sixth Affirmative Defense, Tempo asserts that the Agreement entered into between the parties requires application of California law and "this suit, alleging violation of Iowa law, was filed in breach of that provision."⁵ PINcheck argues that the defense "doesn't exist" and that the choice of law provision would only apply to the contract claim in any event.⁶

While a copy of the Agreement entered into between the parties was attached to the Amended Complaint as Exhibit 1 (docket number 8-2), it would be premature for the Court to make any judgments regarding the legal effect of its terms. As noted above, striking a pleading "is an extreme and disfavored measure." *BJC Health System*, 478 F.3d at 917. A motion to strike will be denied if the allegation "fairly presents a question of law or fact which the court ought to hear." *Lunsford*, 570 F.2d at 229. The Court finds that PINcheck's request to strike Tempo's Sixth Affirmative Defense should be denied.

C. Tenth Affirmative Defense -- Statute of Limitations

In its Tenth Affirmative Defense, Tempo asserts that "PINcheck's claims are barred by the applicable statute of limitations."⁷ In its Amended Complaint, PINcheck claims that

⁵See Answer (docket number 14) at 6.

⁶See Brief in Support of Plaintiff's Motion to Strike Affirmative Defenses (docket number 21-2) at 4.

⁷See Answer (docket number 14) at 6.

the Agreement was negotiated in 2006.⁸ Furthermore, PINcheck alleges in its Brief that “[t]he trade secret misappropriation occurred during this same time frame.”⁹ In a footnote to its Resistance, Tempo states that “[b]ased on PINcheck’s assertion in its brief that that claim arose no earlier than 2006, Tempo does not resist the motion to strike its statute of limitations defense (10th Affirmative Defense) or its laches defense (11th Affirmative Defense).”¹⁰ Accordingly, by agreement of the parties, the Court finds that Tempo’s Tenth Affirmative Defense should be stricken.

D. Eleventh Affirmative Defense -- Laches

In its Eleventh Affirmative Defense, Tempo asserts that “PINcheck’s claims are barred by laches.”¹¹ PINcheck requests that the Affirmative Defense be stricken, arguing that it is an equitable defense which is “inappropriate in an action asserting breach of contract and violation of the Iowa Trade Secrets Act, claims founded solely at law.”¹² While disputing the legal principle urged by PINcheck, Tempo states in a footnote to its Resistance, that it does not resist the Motion to Strike its laches defense.¹³ Accordingly, by agreement of the parties, the Court finds Tempo’s Eleventh Affirmative Defense should be stricken.

⁸See Amended Complaint (docket number 8-2) at 3, ¶ 11.

⁹See Brief in Support of Plaintiff’s Motion to Strike Affirmative Defenses (docket number 21-2) at 5.

¹⁰See Tempo Payments, Inc.’s Resistance to Plaintiff’s Motion to Strike Affirmative Defenses (docket number 26) at 3, n.1.

¹¹See Answer (docket number 14) at 6.

¹²See Brief in Support of Plaintiff’s Motion to Strike Affirmative Defenses (docket number 21-2) at 5.

¹³See Tempo Payments, Inc.’s Resistance to Plaintiff’s Motion to Strike Affirmative Defenses (docket number 26) at 3, n.1.

E. Twelfth Affirmative Defense -- Unclean Hands

In its Twelfth Affirmative Defense, Tempo claims that “PINcheck is barred by the doctrine of unclean hands from asserting any of the claims in the Complaint.”¹⁴ PINcheck argues that an equitable defense of “unclean hands” cannot be asserted in a claim “founded solely at law.”¹⁵ PINcheck further argues that the defense was not pleaded with sufficient specificity.

The parties disagree regarding whether an equitable defense, such as unclean hands, can be asserted in a breach of contract or misappropriation of trade secrets claim. Neither party cited any authority directly on point. The Court declines the opportunity to resolve this issue on a Motion to Strike. The Court finds, however, that Tempo should be required to amend its Answer to “state in short and plain terms” the basis of its claim. FED. R. CIV. P. 8(b). *See also Reis Robotics USA, Inc. v. Concept Industries, Inc.*, 462 F. Supp. 2d 897, 907 (N.D. Ill. 2006).

F. Fifteenth Affirmative Defense -- Lack of Harm

In its Fifteenth Affirmative Defense, Tempo asserts that “PINcheck has suffered no injury or damage whatsoever, and Tempo is not liable to PINcheck for any injury or damage claimed, or for any injury or damage whatsoever.”¹⁶ PINcheck argues that “[t]his purported defense amounts to nothing more than Tempo claiming at the pleading stage that it ultimately will prevail.”¹⁷

The Court concludes that Tempo’s assertion does not constitute an affirmative defense. Rather, it simply denies one of the elements which PINcheck will be required to

¹⁴ See Answer (docket number 14) at 6.

¹⁵ See Brief in Support of Plaintiff’s Motion to Strike Affirmative Defenses (docket number 21-2) at 5.

¹⁶ See Answer (docket number 14) at 7.

¹⁷ See Brief in Support of Plaintiff’s Motion to Strike Affirmative Defenses (docket number 21-2) at 6.

prove at the time of trial. That is, in order to recover damages, PINcheck will be required to prove that it suffered “injury or damage” as a result of Tempo’s breach of contract or misappropriation of trade secrets. Presumably, Tempo does not, by asserting an affirmative defense, wish to assume the burden of proving that PINcheck did *not* suffer any damage. The law places the burden of proof on PINcheck and the purported affirmative defense is unnecessary. Accordingly, the Court finds that it should be stricken.

G. Twentieth Affirmative Defense -- Exemplary Damages

In its Twentieth Affirmative Defense, Tempo asserts that “[n]either the Complaint nor any claim in it states a claim upon which exemplary damages may be awarded.”¹⁸ PINcheck argues that “Tempo ignores that the Iowa Trade Secrets Act specifically provides that exemplary damages may be recovered upon a showing of a willful misappropriation.”¹⁹

Iowa Code Section 550.4(2) provides that “[i]f a person commits a willful and malicious misappropriation [of trade secrets], the court may award exemplary damages.” In its requested relief, PINcheck seeks both compensatory and exemplary damages.²⁰ As noted by Tempo, however, PINcheck did not specifically plead a “willful and malicious” misappropriation. PINcheck argues that under notice pleading, simply requesting exemplary damages in its prayer for relief “has put Tempo on notice of its claims.”²¹

While not a model of clarity, Tempo’s Resistance appears to concede that PINcheck “certainly would be granted leave to amend” its Complaint to properly plead the grounds

¹⁸ See Answer (docket number 14) at 8.

¹⁹ See Brief in Support of Plaintiff’s Motion to Strike Affirmative Defenses (docket number 21-2) at 7.

²⁰ See Amended Complaint and Jury Demand (docket number 8-2) at 6.

²¹ See Brief in Support of Plaintiff’s Motion to Strike Affirmative Defenses (docket number 21-2) at 7.

for exemplary damages.²² That is apparently the reason why Tempo did not file a motion to strike PINcheck's request for exemplary damages.

The Court concludes that PINcheck should be required to further amend its Complaint to specifically plead willful and malicious conduct in support of its claim for exemplary damages. When properly pleaded, however, the burden of proof falls squarely on PINcheck to prove those allegations. At that point, the dispute becomes a factual issue, rather than a legal issue, and a purported affirmative defense would seem to be unnecessary. That is, like the "lack of harm" defense set forth in Tempo's Fifteenth Affirmative Defense, Tempo is simply denying an element which PINcheck will be required to prove.

Accordingly, the Court finds that PINcheck should be given ten days in which to further amend its Complaint, alleging the willful and malicious conduct required in order to support a claim for exemplary damages. At that point, Tempo's Twentieth Affirmative Defense is nothing more than a mere denial of PINcheck's allegations and should be stricken.

V. ORDER

It is therefore ordered that the Motion to Strike Affirmative Defenses (docket number 21) filed by Plaintiff is hereby **GRANTED** in part and **DENIED** in part, as follows:

1. Tempo's Second Affirmative Defense (vagueness), Tenth Affirmative Defense (statute of limitations), Eleventh Affirmative Defense (laches), Fifteenth Affirmative Defense (lack of harm), and Twentieth Affirmative Defense (exemplary damages) are hereby stricken.

²² See Tempo Payments, Inc.'s Resistance to Plaintiff's Motion to Strike Affirmative Defenses (docket number 26) at 9.

2. Defendant shall, not later than ten (10) days following the entry of this Order, amend its Answer and Twelfth Affirmative Defense to state in short and plain terms the basis of its claim that PINcheck has “unclean hands.”

3. Plaintiff shall, not later than ten (10) days following the entry of this Order, further amend its Complaint to allege grounds necessary to assert a claim for exemplary damages.

DATED this 30th day of August, 2007.

JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA